IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 136 of 2000

with

CRIMINAL MISC.APPLICATION No 8734 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VINOD CHANDRAPAL HARIJAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 136 of 2000
   MS SADHANA SAGAR for Petitioner No. 1
   THROUGH JAIL for Petitioner No. 1
   MS N V JOSHI, APP for Respondent No. 1
2. Criminal Misc.Application No. 8734 of 2002
   MS SADHANA SAGAR for Petitioner No. 1
   PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 20/03/2003

ORAL JUDGEMENT

This is an appeal under Section 374 of the Code of Criminal Procedure, 1973 (for short, "the Code") in order to challenge the judgment and conviction order

recorded by the learned Additional Sessions Judge, Vadodara on 27/01/2000 in Sessions Case No. 102 of 1999 under which the learned trial Judge convicted the present appellant for offences punishable under Sections 363, 366 and 376 of IPC and sentenced them as follows;

(1) For an offence punishable under Section 363 of IPC, the first appellant to undergo RI for Two Years and to pay fine of Rs.300/- and in default of payment of fine, to further undergo SI for Thirty Days.

(2) For an offence punishable under Section 366 of IPC, the first appellant to undergo RI for Two Years and to pay fine of Rs.300/- and in default of payment of fine, to further undergo SI for Thirty Days.

(3) For an offence punishable under Section 363 of IPC, the second appellant to undergo RI for Two Years and to pay fine of Rs.300/- and in default of payment of fine, to further undergo SI for Thirty Days.

(4) For an offence punishable under Section 366 of IPC, the second appellant to undergo RI for Two Years and to pay fine of Rs.300/- and in default of payment of fine, to further undergo SI for Thirty Days.

(5) For an offence punishable under Section 376 of IPC, the second appellant i.e Vinod, to undergo RI for Seven Years and to pay fine of Rs.700/- and in default of payment of fine to further undergo SI for One month.

All the substantive sentences to run concurrently.

2. The facts of the case of the prosecution before the trial court may be briefly stated as follows;

The informant with his wife and daughter - Dhaniben had gone to the outskirts of Village Ashapura for labour work. The two appellants were also doing labour work at the said place and therefore, the informant and the appellants had come into contact. That on 06/05/98, in the early hours, the informant and his wife had gone to Village Sihor, leaving the minor daughter,

Dhaniben, alone in their house. The elder brother of the informant was staying in the adjoining house and therefore, he had gone to the house of the informant, to meet the daughter Dhaniben. On the next day, when the informant and his wife returned to their Village, it was noticed that the victim - Dhaniben was not there. On inquiry, it was found that the two appellants had taken her away. Inquiry was made and yet she was not traced out. Therefore, FIR was filed on 09/05/98 by the informant. Then, it was noticed that the appellants had taken the said minor girl to a place in Uttar Pradesh State. Therefore, inquiry was made there also. But the victim could not be traced out there also. Ultimately, on 01/06/98, appellant no. 2 and the victim appeared before Dabhoi Police Station. Thereafter, their clinical examination was undertaken and after due investigation, chargesheet was filed against the two appellants. The case was committed to the Court of Sessions. There the appellants were tried. Witnesses were examined and after the close of trial, the trial court found the appellants guilty for the aforesaid offences. After hearing the appellants on the quantum of punishment, the trial court inflicted the aforesaid punishment on the appellants.

3. Feeling aggrieved by the said judgment and conviction order of the trial court, the appellants have preferred this appeal before this Court.

4. It has been contended here that it was not proved before the trial court that the victim was below the age of 16 years. That, it was not proved before the trial court that the appellants have committed the aforesaid offences. That on the whole, the judgment and conviction order of the trial court are illegal and erroneous and deserve to be set aside. It is, therefore, prayed that the present appeal be allowed, the judgment and conviction order of the trial court be set aside and the appellants be acuitted of the aforesaid offences.

5. The appeal was admitted and at the hearing, Ms.Sadhana Sagar, learned advocate appeared on behalf of the appellants and Ms.N V Joshi, learned APP appeared on behalf of the State. Incidentally, they have taken me through the judgment and observations of the trial court. They have also taken me through the evidence on record. If we go through the evidence on record, it can be found

that the informant has been examined at Ex.11 and there he has given details as to how the incident took place. His evidence is supported in FIR, Ex. 12. The evidence of the informant and the FIR, clearly show that the informant and his wife, both had gone to Village Sihor and when they returned, it was noticed that the victim - Dhaniben was not there and on inquiry, she could not be traced out. Therefore, further inquiry was made and since the victim was not traced out, FIR was filed after two to three days. It is, further noticed from the evidence of this witness that the age of the victim was below 16 years, at the time of the commission of the offence.

6. Then, we can consider the evidence of victim Dhaniben, Ex.15, who has clearly supported the case of the informant, with respect to her age and with respect to the fact that she was taken away by the two appellants and the fact that one of the two appellants committed rape on her, repeatedly. The above evidence is further supported by the medical evidence and panchnama. The clothes of the victim, as well as of the appellants, were seized. The evidence of the Medical Officer and the Forensic Science Laboratory Experts' opinion also support the case of the prosecution. The trial court has recorded a finding that the victim was below the age of 16 years, at the time of the commission of offence. The above finding is based on the oral evidence of the informant and of Dhaniben and it is further supported by the medical evidence and other materials on record. It is also found from the record that the prosecution had produced on record, at Ex.32, the evidence of certificate from the School records. The School Leaving Certificate is produced on record, at Ex.34. This clearly establishes the fact that the victim was below the age of 16, at the time of the commission of offence.

7. Once the victim is found to be below the age of 16, then the question of consent cannot be taken into account and there cannot be any dispute about the same. It may be considered that the school employee had made it clear during the course of his examination, that as per practice, a certificate from the Talati of the Village Panchayat is produced, at the time of admission of a student in the school and the said certificate is returned to the guardian. It has also been made clear that in this case also, the same practice was followed. In that view of the matter, it is not possible to accept the argument of the learned advocate for the appellant that the prosecution has not proved that the victim was below the age of 16 years. It is also not possible to

accept the argument that the age shown in the school records, is an approximate age and not the genuine age. It is more so, when the said date has been recorded on the basis of the Certificate issued by the Talati. It is well known that under the Birth and Death Registration Act, the authorities are required to maintain Registers of Births and Deaths. When the date of birth of the victim was recorded in the said Register, then in that case, it is a primary evidence which has to be taken, to be conclusive one, unless disproved. The school Officer has said that the victim was admitted in the school on production of the Certificate from the Talati-cum-Mantri. This shows that there was an entry in the Birth Register of the victim, showing the birth date of the victim, which shows that the victim was below the age of 16 years. Therefore, the trial court was justified in relying upon the said evidence and in holding that the victim was below the age of 16, at the time of the commission of offence. So far, the actual offence is concerned, the victim, the informant and the brother of the informant, have said that the victim was taken away by the appellants and there one of the appellants had committed rape on the victim. In fact, the appellants have not shown that there was some enmity with the victim or with her family. The victim and the informant had no reason to give a false evidence before the trial court. Their evidence has stood the test of cross-examination. This shows that the evidence of the victim and the informant was found to be reliable. The trial court has not committed any error in relying upon the said evidence of the victim and that of the informant. Once the evidence of the victim and the informant is found to be reliable and when once it is found that the said evidence inspires confidence, then in that event, there is no alternative, but to hold the appellants guilty for the aforesaid offences. It is required to be seen that even the report of the F.S.L. supports the case of the informant and the victim. Same way, even the medical evidence also conclusively proves the fact that rape was committed on the victim. For the said purpose, the Medical Officer has given reasons for coming to the said opinion.

8. Therefore, there was sufficient material before the trial court, to hold the appellants guilty for the aforesaid offences. On going through the judgment of the trial court and on going through the evidence on the records of the trial court, it is found that the trial court has not committed any error in coming to the finding that the appellants had committed the aforesaid offences and one of the two appellants, that is appellant

Vinod had committed rape on her. Since the victim is found to be below the age of 16 years, her consent, if any, would not be relevant for our consideration. In that view of the matter, there is no merit in the present appeal and it deserves to be dismissed. It has been stated at the Bar that though the appellant was ordered to be released on bail, he is in jail to serve out sentence in default of payment of fine.

9. For the foregoing reasons, this appeal is ordered to be dismissed.

(D. P. Buch, J.)

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